

No. 13677

United States
Court of Appeals
for the Ninth Circuit.

SEVERO RUIZ CHAVEZ, Also Known as CAYE-
TANO MENDEZ,

Appellant,

vs.

JAMES McGRANERY, as Attorney General of the
United States, and H. R. LANDON, as District
Director of Immigration at Los Angeles,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.



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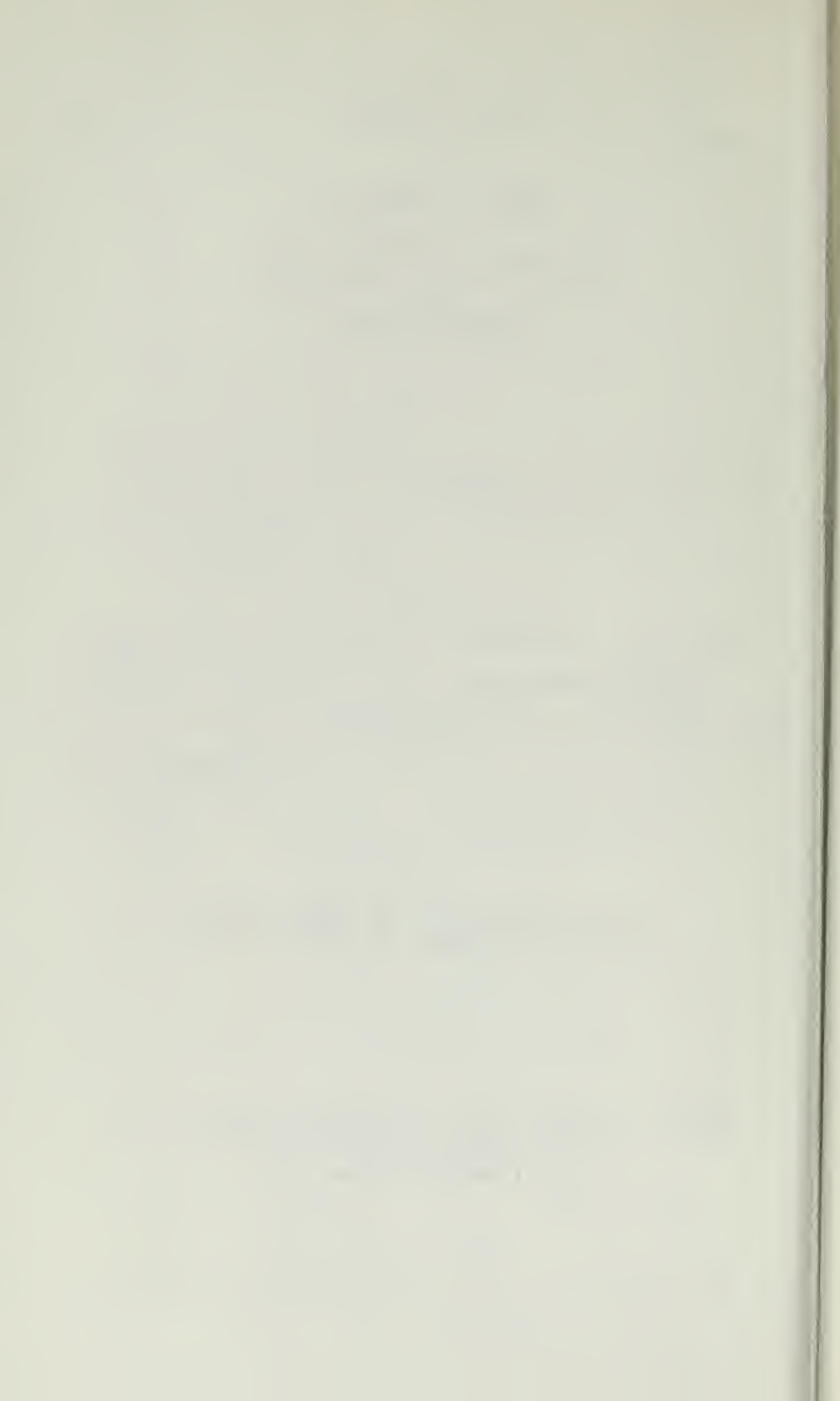
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JAMES McGRANERY, as Attorney General of the
United States, and H. R. LANDON, as District
Director of Immigration at Los Angeles,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DAVID C. MARCUS,
206 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;
CLYDE C. DOWNING,
ROBERT K. GREAN,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

DEPARTMENT OF CHEMISTRY

PHYSICAL CHEMISTRY

LECTURE NOTES

BY

PROFESSOR

ROBERT W. CROMBIE

1954

CHICAGO, ILL.

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1954

CHICAGO, ILL.

United States District Court, Southern District of
California, Central Division

Civil Action No. 14,301-WB

In the Matter of

The Petition of SEVERO RUIZ CHAVEZ, Also
Known as CAYETANO MENDEZ,

Petitioner,

vs.

JAMES McGRANERY, as Attorney General of the
United States, and H. R. LANDON, as District
Director of Immigration at Los Angeles,

Respondents.

PETITION FOR JUDICIAL REVIEW OR
HABEAS CORPUS

To the Honorable District Court of the United
States, Southern District of California, Central
Division:

The petition of Severo Ruiz Chavez respectfully
recites:

I.

Petitioner is a native and citizen of the Republic
of Mexico.

II.

On September 20, 1947, a warrant of arrest was
issued by the Department of Justice, Immigration
and Naturalization Service, charging petitioner with
having entered the United States at El Paso, Texas,

on or about December 20, 1938, in violation of the Immigration Act of May 26, 1924, in that at the time of his entry [2*] he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said act or regulations made thereunder.

III.

That said warrant of arrest was served upon your petitioner on the 17th day of October, 1947, and thereafter proceedings were held under said warrant of arrest on July 12, 1950, before said Immigration Service at Los Angeles, California.

IV.

That petitioner testified substantially at said hearing that he was born at Hidalgo, state of Jalisco, Republic of Mexico, on the 21st day of February, 1918. That his father, a citizen of the Republic of Mexico, resided in the state of California and died in Los Angeles County. That petitioner last entered the United States on or about November 18, 1938, near the port of El Paso, Texas; that at the time of his entry he was not in possession of an immigration document, visa, passport, or other travel document, which permitted him to enter and remain permanently in the United States. That petitioner at no time since November 13, 1938, departed from the United States, nor was he ever arrested or deported, but has been a continuous resident of the United States since said November 13, 1938. Petitioner was married in the Republic of Mexico in

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

1934. His wife is a citizen of the Republic of Mexico. At the time of said hearing, he had been separated from his wife for more than ten years. One child was born as the result of this marriage, who is residing with his mother in the Republic of Mexico.

Petitioner further testified that he was employed at Altadena in restaurant work on a percentage basis; that he had a couple of arrests for intoxication and paid a fine therefor. Petitioner further testified that he did not serve in the armed forces of the Republic of Mexico; that he served in the armed forces of the [3] United States of America. His honorable discharge from the Army of the United States on March 18, 1943, was presented and read into the record. There was offered in behalf of the petitioner and received in evidence his draft registration certificate showing that he was registered for military service on July 1, 1941, by Local Board 188, Pasadena, California; that except for the time of his service in the armed forces, petitioner lived and resided in the county of Los Angeles, state of California, since the year 1938 continuously. Petitioner registered under the Alien Registration Act of 1940 and for selective service under the military training act of 1938.

That during the said proceedings, petitioner was advised by the Hearing Officer of his right to apply for suspension of deportation on the grounds of his seven years' continuous residence in the United States and proof of good moral character for the

period of five years. Petitioner thereupon made application, which application was accepted for the privilege of suspension of deportation and the discretion granted under the statutes in full force and effect. That thereafter said matter was continued for hearing August 22, 1950, at which time petitioner appeared and the following proceedings took place:

There was submitted on behalf of petitioner and filed in the proceedings a formal application for suspension of deportation (Form I-55) as Exhibit 3. The affidavits of Edgar E. Brandin and Stella M. Falkenberg were introduced on behalf of the Petitioner as Exhibits 4 and 5, attesting to the good moral character of the petitioner for more than five years preceding the commencement of said proceedings. There was further introduced on behalf of the petitioner his employment record for more than five years.

Petitioner further testified that he was contributing toward the support of his wife and child in the Republic of Mexico; that [4] he had not lived with his wife since 1938 and had not heard from her since that time. Petitioner further testified that he received a medical discharge from the army of the United States.

There was introduced in evidence on behalf of the petitioner the investigation report of the Government indicating no adverse record of petitioner of good moral character during the preceding five years. Petitioner further testified that he had never

received any public aid, charity or assistance; that he was a member of the A. F. of L. and C. I. O. Unions and was never a member of any organization which advocated the overthrow of the Government of the United States by force or violence. He testified that he was willing to again serve in the armed forces of the United States and that he was in accord with the democratic principles of the United States. He further testified that his property consisted of a 1941 automobile, cash and a stock of food at his place of employment.

The matter having been submitted, the Hearing Officer determined on the 3rd day of January, 1951, that the petitioner (1) is an alien, a native and citizen of Mexico; (2) that his only entry into the United States occurred on or about November, 1938, at El Paso, Texas; (3) that at the time of entry petitioner intended to work and remain in the United States permanently; (4) that at the time of entry he was not in possession of an immigration visa.

The Hearing Officer further determined as a conclusion of law that the petitioner was subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa.

The Hearing Officer further determined (1) that the petitioner was not ineligible for naturalization; (2) that he has been a person of good moral character for the past five years; (3) that [5] he has resided in the United States continuously for at least the past seven years; (4) that he was residing in

the United States on July 1, 1948; that there has been no evidence developed in the proceedings to establish that the petitioner was deportable under any of the grounds specified in section 19(d) of the Immigration Act of 1917.

As Conclusions of Law as to Discretionary Relief, the Hearing Officer determined that the petitioner meets the statutory requirements for eligibility for suspension of deportation pursuant to section 19(c) (2) (b) of the Immigration Act of 1917, as amended, and that he meets the statutory requirements for eligibility for voluntary departure pursuant to section 19(c) (1) of the Immigration Act of 1917, as amended. The Hearing Officer did thereupon recommend that petitioner be required to voluntarily depart from the United States.

Thereafter the Immigration Board of Appeals ordered that the order of deportation be not entered but that petitioner be required to depart from the United States.

That thereafter a further petition was made to the Immigration Board of Appeals for a consideration of petitioner's right to suspension of deportation, and on the 19th day of October, 1951, the said Board of Immigration Appeals entered an order requiring petitioner to depart from the United States with the proviso that deportation be effected if the alien did not avail himself of such required departure. That said order is now in effect and petitioner's departure must be effected on or before July 2, 1952, otherwise the deportation of petitioner will be effected pursuant to said order.

V.

That the hearings before the said Immigration Service, which resulted in the order requiring petitioner's departure from the United States were not held pursuant to the Administrative Procedure Act in full force and effect during the proceedings, in that [6] pursuant to section 11 of said act, the Hearing Officer conducting said hearing was never legally, duly, lawfully or regularly appointed pursuant to said act, and, therefore, said hearings were conducted in violation of law.

VI.

That said Immigration Service, in conducting said hearings and in denying petitioner's request for suspension of his deportation, acted arbitrarily, capriciously and unwarranted. The Hearing Officer during the course of said proceedings and in conducting the same acted in violation of law; that the decision of said Hearing Officer in recommending an order requiring petitioner's departure from the United States was arbitrary, capricious and unwarranted.

VII.

The decision of said Hearing Officer was contrary to the facts and the law, capricious and in violation of petitioner's rights to a fair and impartial hearing.

VIII.

Petitioner was denied procedural due process of law, in that the Hearing Officer conducting said

hearings was not lawfully and legally appointed according to law to conduct said hearings.

IX.

That the act of said Immigration Service in failing to grant petitioner the discretionary relief provided by statute, 8 U.S.C.A. sec. 155, Aliens & Nationality, as amended by Public Law 863, 80th Congress, Ch. 783:

“(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart from the United States to any other country of [7] his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * *”

and the failure to suspend his deportation, was capricious, arbitrary and unwarranted and a violation of said section as aforesaid and the discretion vested in said Immigration Service by said section.

X.

The acts of the said Immigration Service by its said Director of Immigration and those acting under

his orders as aforesaid were in violation of the rules and regulations of said Service, promulgated to safeguard the constitutional rights of persons subject to the Immigration laws of the United States.

XI.

Petitioner herein respectfully requests a judicial review under the Administrative Procedure Act (5 U.S.C.A., sec. 1009), which provides in part as follows:

The pertinent portions of section 10 of the Act, 5 U.S.C.A., sec. 1009, are:

“Except so far as (1) statutes preclude Judicial review * * *

“(a) Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof.

“(b) The form of proceeding for judicial review shall be any special statutory review proceeding * * * or, in the absence thereof, any applicable form of [8] legal action * * *

* * *

“(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review, any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subjected to review upon the review of the final agency action. * * *”

It is further provided by section 10, sec. 1009(e) (B) of the Act that the Court upon review shall "hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. * * *"

XII.

That petitioner herein is not held by virtue of any warrant, indictment, information or other legal process.

XIII.

That said order of said Immigration Service is vague, indefinite and uncertain in that it does not designate any place to which the alien is to be deported.

Wherefore, petitioner prays:

(1) That citation issue against respondents James McGranery, Attorney General of the United States, and H. R. Landon, District Director of Immigration at Los Angeles, to show cause before this Court why said proceedings resulting in the enforced voluntary departure of petitioner from the United States, should not be annulled.

(2) For a judicial review of the administrative process of said Immigration Service.

(3) For any appropriate writ, citation or order of this Court [9] concerning the hearings, processes, procedure and practice of said Immigration Service and its District Director and officers, or, in the

alternative, for a writ of habeas corpus directed to said Immigration Service commanding them to be and appear before this Honorable Court concerning the restraint of petitioner, and

(4) For such other orders or citations which may be proper and commensurate with the foregoing petition.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed July 2, 1952. [10]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL

To the Plaintiff Above Named and to David C. Marcus, His Attorney:

You, and Each of You, Will Please Take Notice that the above-named defendants, by and through the undersigned, will bring the following Motion for Dismissal under Rule 12 (b) (2), (3), (4), (5) and (7), F.R.C.P., on for hearing before the above-entitled Court in the Courtroom of the Honorable William M. Byrne, United States District Judge, in the United States Post Office and Courthouse, Los Angeles, California, on Monday, the 6th day of October, 1952, at 9:45 o'clock in the forenoon of that

day, or as soon thereafter as counsel can be heard.

Dated at Los Angeles, California, this 25th day of September, 1952.

WALTER S. BINNS,
United States Attorney.

CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Asst. U. S. Attorney,
Attorneys for Respondents.

[Title of District Court and Cause.]

MOTION FOR DISMISSAL UNDER RULE 12
(b) (2), (3), (4), (5) and (7), FEDERAL
RULES OF CIVIL PROCEDURE

Come now the defendants above named and appearing specifically for the purpose of this motion for dismissal and reserving all objections to the jurisdiction of this Court, by and through their attorneys, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and move the Court for dismissal of the within action, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, on the following grounds: lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency

of service of process and failure to join an indispensable party.

This motion is based and will be presented upon the complaint of the plaintiff filed herein and upon the Memorandum of Points and Authorities in Support of Motion for Dismissal attached hereto.

WALTER S. BINNS,
United States Attorney.

CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Asst. U. S. Attorney,
Attorneys for Respondents.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1952. [13]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Petitioner has filed a petition which he denominates "Petition for Judicial Review or Habeas Corpus," naming the Attorney General and the local District Director of Immigration as respondents.

The material allegations of the petition may be summarized as follows: Petitioner is a native and citizen of the Republic of Mexico, born February 21, 1918, at Hidalgo, Mexico; petitioner last entered the

United States on or about November 18, 1938, near the port of El Paso, Texas; at the time of his entry he was not in possession of an immigration document, visa, passport or other travel document which permitted him to enter and remain permanently in the United States; he has resided in the United States continuously ever since; petitioner was married in the Republic of Mexico in 1934; he has one child as a result of this marriage; his wife and child reside in Mexico; at a hearing pursuant to a warrant of arrest issued in 1947 by the Department of Justice, Immigration and Naturalization Service, having been advised of his right to do so, the [20] petitioner made application for the privilege of suspension of deportation under the discretion granted to the Attorney General by section 155(c), Title 8 U.S.C.A.; petitioner's application was accepted and a hearing granted; it was determined that petitioner is a citizen of Mexico subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa; petitioner meets the statutory requirement for eligibility for voluntary departure pursuant to 8 U.S.C.A. 155(c) (1), and for suspension of deportation pursuant to 8 U.S.C.A. 155(c) (2); an order was made granting petitioner the privilege of voluntary departure under the authority vested in the Attorney General by section 155(c) (1).

The petitioner further alleges that the failure to grant petitioner discretionary relief suspending his deportation, was capricious, arbitrary and unwarranted and a violation of 8 U.S.C.A. 155, and "the

discretion vested in said Immigration Service by said section.” (Note: Section 155 vests the discretion in the Attorney General.) It is further alleged that petitioner was denied procedural due process of law in that the hearing officer conducting said hearings was not lawfully and legally appointed according to law to conduct said hearings, and that his decision recommending an order requiring petitioner’s voluntary departure from the United States was arbitrary, capricious and unwarranted. Petitioner prays that citation issue against the Attorney General and the District Director of Immigration to show cause before this Court why said proceedings should not be annulled.

The respondents have moved for a dismissal on the grounds of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of [21] service of process and failure to join an indispensable party.

Respondents contend that this is a case where agency action may not be judicially reviewed because it is a case peculiarly committed to agency discretion, wherein the action is by section 155(c) of Title 8 committed to the discretion of the Attorney General, and cite the exception to the right to judicial review contained in 5 U.S.C.A. 1009, as follows:

“Sec. 1009. Judicial review of agency action. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.”

The exception refers only to exercised discretion and does not mean that merely because a statute commits action to agency discretion, the right to judicial review does not exist to determine whether or not the discretion has been exercised. *U. S. ex rel Adel vs. Shaughnessy*, 183 F. 2d 371. The statute with which we are here concerned commits the exercise of discretion to the Attorney General. The Court may not, in a review of the agency action, substitute its discretion for that of the Attorney General, but where the petitioner has alleged he was denied procedural due process of law which deprived him of the exercise of the Attorney General's discretion, he is entitled to a hearing and judicial determination of that question. This right is derived, not from the statute, but from the Fifth Amendment to the Constitution of the United States, which prohibits a deprivation of liberty or property without due process of law. *Bridges vs. Wixon*, (C. A. 9); 144 F. 2d 927 (reversed on other grounds).

A decree requiring the Attorney General to exercise the discretion committed to him could only be effective if granted by a court with jurisdiction over his person. The Attorney General's residence is in the District of Columbia. This Court's process does not extend to the District of [22] Columbia and it cannot require his attendance here. It, therefore, has no jurisdiction over his person. *Connor vs. Miller*, 178 F. 2d 755.

We now come to the question of whether petitioner can proceed against the local District Director of Immigration alone, or whether the Attorney General is an indispensable party.

The petitioner contends that the Attorney General is not an indispensable party, and relies upon *Williams v. Fanning*, 332 U.S. 490, and *Navarro v. Landon*, 106 F. Supp. 73, decided by this Court on the authority of the *Fanning* case.

In the *Navarro* case the plaintiff alleged that he was a legal resident of the United States lawfully admitted to this country on an immigration visa as a non-quota immigrant for permanent residence; that an order for his deportation had been issued and the District Director threatened to deport him unless restrained by the Court. In the *Navarro* case the issue raised by the complaint was whether the plaintiff was a legal resident entitled to permanent residence. If the Court determined the issue in plaintiff's favor, the District Director would be ordered to desist in his efforts to disturb plaintiff in the enjoyment of his legal residence and the matter would be at an end. The decree would effectively grant the relief sought by the plaintiff without requiring the District Director's superior to do a single thing. Therefore, under the authority of the *Fanning* case, the District Director's superior was not an indispensable party.

The instant case is distinguishable in that the relief which the petitioner is seeking requires affirmative action on the part of the District Director's superior. There is no contention that petitioner is a legal resident of this country. On the contrary, he alleges that he entered [23] the United States illegally and that, as a deportable alien he is seeking

a grant of suspension of deportation. The Attorney General alone is vested with the discretionary power to grant suspension of deportation, and a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. It follows that the Attorney General is an indispensable party. *Williams vs. Fanning, supra; Daggs vs. Klein, (C. C. A.) 169 F. 2d. 174.*

The motion to dismiss is granted.

Dated this 30th day of October, 1952.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed October 31, 1952. [24]

United States District Court, Southern District of
California, Central Division

No. 14,301-WB Civil

In the Matter of

The Petition of SEVERO RUIZ CHAVEZ, Also
Known as CAYETANO MENDEZ,

Petitioner,

vs.

JAMES McGRANERY, as Attorney General of the
United States, and H. R. LANDON, as District
Director of Immigration at Los Angeles,

Respondents.

JUDGMENT OF DISMISSAL

The motion of the respondents to dismiss the action on the grounds of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party having been heard on October 20, 1952; the petitioner appearing by his attorney, David C. Marcus, Esquire, and the respondents appearing by United States Attorney Walter S. Binns, and Assistant United States Attorney Robert K. Grean, and the Court having filed a memorandum of decision holding that said motion to dismiss should be granted, and the Court being fully advised in the premises and good cause appearing therefor, it is hereby

Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby, dismissed for lack of jurisdiction of the person of the Attorney General and failure to join an indispensable party.

Dated this 31st day of October, 1952.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed October 31, 1952.

Docketed and entered October 31, 1952. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States Attorney, to the Respondents
Above Named and to the United States District
Court, the Honorable William Byrne, Judge
Presiding:

Please Take Notice that the petitioner above
named hereby appeals to the United States Court
of Appeals for the Ninth Circuit from the judgment
of the above-entitled Court entered on the 31st day
of October, 1952, in the above-entitled matter.

Dated this 3rd day of November, 1952.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed November 5, 1952. [26]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States
District Court for the Southern District of Cali-
fornia, do hereby certify that the foregoing pages
numbered from 1 to 29, inclusive, contain the origi-
nal Petition for Judicial Review or Habeas Corpus;
Notice of and Motion for Dismissal, etc.; Memo-
randum of Decision; Judgment of Dismissal; No-
tice of Appeal; Designation of Record on Appeal

United States Court of Appeals
for the Ninth Circuit

No. 13,677

SEVERO RUIZ CHAVEZ, Also Known as CAYE-
TANO MENDEZ,

Petitioner and Appellant,

vs.

JAMES McGRANERY, as Attorney General of the
United States, et al.,

Respondents and Appellees.

STATEMENT OF POINTS RELIED UPON

1. That the lower court was without authority to dismiss the petition.

Dated this 2nd day of March, 1953.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 4, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

The above-named appellant hereby designates the following as the record on appeal in the above-entitled matter:

1. Petition for Judicial Review or Habeas Corpus.
2. Notice of Motion for Dismissal, etc.
3. Memorandum of Decision.
4. Judgment of Dismissal.
5. Notice of Appeal.
6. Statement of Points Relied Upon.
7. This Designation of Record on Appeal.
8. Certificate of Clerk.

Dated this 2nd day of March, 1953.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 4, 1953.

